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In the
Supreme Court of the United States

OCTOBER TERM, 1956

NORTHERN PACIFIC RAILWAY COMPANY and NORTHWESTERN IMPROVEMENT COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

M. L. COUNTRYMAN, JR.
176 East 5th Street
St. Paul 1, Minnesota

DEAN H. EASTMAN
ROSCOE KRIER
HAROLD G. BOGGS
909 Smith Tower
Seattle 4, Washington
Counsel for Defendants-Appellants

THE ARGUS PRESS, SEATTLE

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UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellants appeal from the partial final judgment of the United States District Court for the Western District of Washington, entered August 31, 1956, granting a permanent injunction against appellants, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinions of the District Court for the Western District of Washington, Northern Division, are not reported. Copy of the court's decision, dated June 23, 1956, granting in part appellee's motion for summary

* 142 F. Supp. 679

judgment, the transcript of the court's oral decision of August 31, 1956, denying appellants' motion for reconsideration, and copy of findings of fact, conclusions of law and partial final judgment are attached hereto as Appendix A.

JURISDICTION

This suit is a civil proceeding brought on May 26, 1949, under Section 4 of the Act of Congress of July 2, 1890 (26 Stat. 209, Title 15 U.S.C., Sec. 4), as amended, commonly known as the Sherman Act, to prevent and restrain alleged violations by appellants of Sections 1 and 2 of said Act. The judgment of the District Court was entered on August 31, 1956, and Notice of Appeal was filed in that court on October 23, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 15 U.S.C., Sec. 29. The following decisions sustain the jurisdiction to review the judgment: *Associated Press v. United States*, 326 U.S. 1; *International Salt Co. v. United States*, 332 U.S. 392; *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427; *Cold Metal Process Co. v. United Engineering Co.*, 351 U.S. 445.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether (except in the case of leases of industrial sites on lands held for transportation purposes) agreements which a railroad company and its subsidiary land company customarily include in contracts for the sale of their timber lands or timber and in leases of their lands for grazing purposes or for removal of coal, oil, gas or other natural resources, that the purchaser or

lessee will ship over the lines of the railroad company, where the destination can be reached via its lines, all resulting traffic, provided its rates and service are equal to those of any competing line, are *per se* unreasonable restraints of commerce in transportation in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C., §1) where in consequence of Government land grants in aid of construction of the railroad the companies own lands and reserved mineral rights aggregating several million acres scattered through six States and the actual or potential interstate commerce in transportation of commodities from the properties subject to such agreements is substantial but there is no evidence that the companies have any monopoly of any type of lands or timber or other natural resources in any area or that they have any monopoly power or dominance over any market for lands or timber or other natural resources of any kind.

2. Whether in such a case issues of fact raised by the pleadings as to the economic consequences of said agreements, their effects upon purchasers and lessees, their effects upon competition, and their reasonableness under all the circumstances, constitute material issues of fact for trial.

STATUTES INVOLVED

Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C. §1), set forth in Appendix B hereto. While the complaint alleges violations of Sections 1 and 2 of the Sherman Act, the motion for summary judgment and the judgment itself are grounded on alleged violation of only Section 1 of the Act.

STATEMENT

Appellee's motion for summary judgment filed on July 31, 1953, was based on a record which consists of the complaint, answer, admissions by appellants pursuant to request under Rule 36 of the Rules of Federal Procedure, stipulations, and depositions taken by appellants. In substance, the complaint charged appellants with illegal restraint of interstate trade and commerce, monopolization of and attempts to monopolize interstate trade and commerce, by reason of their admitted long-standing practice of including in contracts for sale of their timber lands or timber, and in leases of their lands for industrial sites, for grazing purposes or for removal of natural resources, agreements that the purchaser or lessee will ship over the lines of the appellant Railway Company, where the destination can be reached by its lines, all resulting traffic, provided its rates and service are equal to those of any competing line. The principal illegal effects of this practice were alleged to be:

(a) That the appellant, Northern Pacific, had secured a substantial monopoly of the transportation of commodities coming from and produced on its own lands and land belonging to others as well;

(b) That purchasers and lessees of appellants' lands had been and were being deprived of a free choice as to both the means of transportation to be used and of markets in which to sell commodities coming from the lands;

(c) That competing railroads, motor truck lines and steamship lines had been and were being deprived of an opportunity to compete in an open market for

the business of transporting products and commodities coming from appellants' lands and other lands.

The answer denied that the use of such agreements, hereinafter referred to as preferential routing agreements or traffic clauses, had resulted or could result in the effects alleged. In addition, the answer set up certain affirmative defenses.

A summary of the facts which must be deemed to be established for the purposes of the motion and this appeal is as follows:

Appellant Railway Company is the successor to Northern Pacific Railroad Company, a land grant railroad, which was chartered by Congress on July 2, 1864, for the purpose of constructing a railroad from Lake Superior to Puget Sound. Appellant, Northwestern Improvement Company, is a wholly-owned subsidiary of the Northern Pacific, which sells, leases and manages certain lands acquired from the Northern Pacific. Under the grants made by Congress by the Act of July 2, 1864 (13 Stat. 365) and the Joint Resolution of May 31, 1870 (16 Stat. 378), the Northern Pacific acquired approximately 39,400,000 acres of land located in the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon, the States through which its railroad was constructed and now operates. Prior to January 1, 1949, appellants and their predecessors had sold 37,216,767.9 acres of the lands thus acquired. Appellants still own approximately 2,700,000 acres of the total, and a substantial part of this acreage is leased for various purposes to others. Approximately 16,000,000 acres were sold with a reservation or exception in the vendor of all minerals, but ap-

pellants have since released by quit claim deed the exceptions or reservations of minerals in all but approximately 6,500,000 acres of this total. The lands sold and those still owned are of various types, some containing timber, some containing iron ore and some containing coal, oil, clay or other natural resources. Appellants are and at all times have been engaged in finding purchasers for the lands, and have not generally engaged in the leasing of lands for grazing purposes except pending sale thereof. Appellants are also engaged in the sale of standing timber and of rights to remove timber, oil, gas, metals, clay, coal and other natural resources from such lands.

The above acreage owned by appellants is exclusive of right of way, including that granted by said Act of July 2, 1864, and the Joint Resolution of May 31, 1870, held for transportation purposes.

Appellant, Northern Pacific, is engaged in the business of transporting commodities and products in interstate and intrastate commerce, including many of the commodities produced or derived from or distributed through the use of lands now or formerly owned by appellants and many products manufactured from such commodities. The Great Northern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, numerous motor freight lines and steamship lines are available for transportation of such commodities and products during all or part of their interstate movement.

Among the affirmative defenses pleaded were the following:

(a) Preferential routing agreements of the type in

question have been usual and customary throughout the history of railroads. Such agreements are normal, natural and reasonable. They do not restrain competition, but on the contrary insure continuing competition as to rates and service.

(b) Appellants have at all times disposed of the land grant lands as rapidly as market conditions would permit. More than 90% of the 37,000,000 acres heretofore sold and conveyed have been conveyed without obtaining any agreement from the purchasers with respect to the routing of traffic. In substantially all cases in which an agreement with respect to the routing of traffic has been obtained from the purchaser or lessee, such agreement has been limited to traffic destined to points on or reached via lines of Northern Pacific, and has been made subject to a proviso that the railroad should not charge a higher rate than that charged by other competing transportation lines between the same points for similar services.

(c) The practices of appellants, hereinabove described, were in effect when the Great Northern and the Milwaukee were constructed or extended from St. Paul and Minneapolis to the Pacific Coast, and had been practiced for many years prior thereto and for many years prior to the advent of the trucking industry. Said competing transportation agencies, which have entered the field served by appellant, Northern Pacific, have grown and prospered and have been and still are in active competition with the Northern Pacific. The products and commodities shipped via Northern Pacific because of such preferential routing clauses constitute, and have at all times

constituted, a relatively small proportion of the commodities and products of like character produced and transported to, from and within the territory served by Northern Pacific.

Appellee's theory in arguing its motion was that any issues of fact raised by the pleadings as to the actual or potential effects of the routing agreements upon the purchasers and lessees affected and upon competition in interstate transportation were immaterial because in its view such routing agreements constitute tying arrangements violative of Section 1 of the Sherman Act under the following rule enunciated in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594:

> "* * * When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable, per se, to foreclose competitors from any substantial market,' a tying arrangement is banned by Section 1 of the Sherman Act when *both* conditions are met." (pp. 608, 609.)

Appellee sought to establish the existence of the first of these conditions on the highly novel theory that the ownership of land, regardless of its location, character or extent, confers monopoly power similar to that conferred by a patent on an invention. On this premise, it argued that it is unnecessary to show dominance over any market for lands and that it is a violation of Section 1 of the Sherman Act for appellants to use mere own-

ership of land to secure the preferential routing via Northern Pacific of any substantial amount of traffic. It relied particularly on *International Salt Co. v. United States*, 332 U.S. 392. The District Court adopted appellee's theory in this respect. In its decision of June 23, 1956, the court said:

> "The tying commodity in the present case is the land presently or formerly owned by NP. Unrestricted fee simple title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land."

Although the answer alleged that the traffic actually affected by the routing clauses constituted a relatively small proportion of the total traffic of like character in the territory served by the Northern Pacific and no evidence upon the subject was before the Court, the Court concluded merely because of the number of leases and contracts for sale of timber containing such clauses that the "actual or potential commerce in transportation of commodities from the properties subject to the traffic clauses is very substantial, however that commerce may compare with the whole volume of commodity transportation in the area served by NP" and that the "amount of commerce in transportation restrained by the traffic clauses in each of the categories in question is not inconsequential or insubstantial."

The court therefore concluded that on the established facts all of the routing clauses in question, except those in industrial leases, are shown to be violative of Section 1 of the Sherman Act. As to the industrial leases which,

with minor exceptions, all grant a use of right of way lands, it was the court's view that, as such lands are an integral part of the property devoted to railway operations and are directly related to transportation, the asserted tied commodity, a question of fact was presented which would preclude summary judgment and require trial on the merits to determine whether such leases involve distinct and separate tied and tying commodities.

Appellants' motion for reconsideration which called particular attention to this court's discussion of what constitutes the relevant market in *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, decided June 11, 1956, was argued and denied. Findings of Fact, Conclusions of Law and Partial Final Judgment enjoining appellants from enforcing existing routing agreements and from entering into any further such agreements, except in the case of the industrial leases, were entered in accordance with the court's decision. Order staying judgment pending the taking of an appeal and during the pendency of this appeal was entered September 5, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The judgment below would prohibit a practice followed by the Northern Pacific and other railroads for more than half a century, notwithstanding the fact that the validity of preferential routing clauses has been repeatedly sustained by all the courts which have considered them* and in the face of a record which is bar-

**Preferential* routing clauses do not *exclude* competitors from the market for transportation services. They preserve competition in the matter of rates and service and control the choice between transportation agencies.

ren of any evidence that the use of the clauses has had or will have any of the economic effects alleged in the complaint. This court has repeatedly approved its statement in *Board of Trade v. United States*, 246 U.S. 231, that in order to test the legality of a restraint of trade the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint and its effect, actual or probable. Here this inquiry has been foreclosed by the court's error in failing to recognize that before appellants can be held to occupy a dominant or monopolistic position in the market for their lands, the court must first determine what is the relevant market or markets for those lands. This fundamental error was induced by the false analogy drawn by appellee between the position of an owner of land and the holder of a patent for an invention in an attempt to bring this case within the orbit of *International Salt Co. v. United States*. The following excerpts from the court's opinions show the basis of his decision:

> "Defendants argue that the first tying element, i.e., market domination over the tying product, is not established because the record does not show

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only where that choice is determined by extrinsic considerations, such as friendship, reciprocity, or the like. For this and other reasons they have uniformly been upheld as not in restraint of trade. *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. St. 284, 33 Atl. 239; *Stephenson v. St. Louis Southwestern Ry. Co. of Texas*, Tex. Civ. App., 181 S.W. 563; *Southwestern Lumber Co. of New Jersey v. Kerr*, 11 F. Supp. 253, aff'd. 78 F.(2d) 348, Cert. Den. 296 U.S. 611. And they have been upheld and enforced as against other objections. *United States v. Northern Pacific Ry. Co.*, 18 F.(2d) 299; *Cascade Timber Co. v. Northern Pacific Ry. Co.*, 28 Wn.(2d) 684, 184 P.(2d) 90; *Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co.*, 4 F.(2d) 359; *Oregon R. & Navigation Co. v. Dumas*, 181 Fed. 781; *Texas & Pacific R. Co. v. Texas Short Line R. Co.*, 80 S.W. 567; *Saner-Whiteman Lumber Co. v. Texas & Mo. R. Co.*, 282 S.W. 267.

the proportion of NP lands of various types to the total of the lands of the same types sold and leased in the area of defendants' operations. This contention ignores the plain language of the cited decisions, providing that market dominance of 'the tying commodity' is required. The tying commodity need only be the particular property or product to which forced purchase of the second commodity is tied; certainly it does not necessarily include all of the similar and competing commodities which may be in the market. * * *

"The tying commodity in the present case is the land presently or formerly owned by NP. Unrestricted fee simple title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land." (June 23, 1956.)

"If you are right in your view that in a case grounded on Paragraph 1 of the Sherman Act, monopoly must be shown and that the term 'dominance' and 'market' are interchangeable, then my opinion is probably wrong. However, I should point out that if that be true, there would never be any occasion for the doctrine of the tying cases because if you were considering an established monopoly, you wouldn't have to be concerned about what the monopolist did with it. The monopoly in and of itself would be unlawful, and whether used for tying purposes or otherwise would be of no concern.

" * * * If the facts show that you have absolute fee simple title over vast quantities of land, that shows the dominance right there. There isn't any further need be shown because you had absolute

market control even more unlimited in some respects than the patent holder." (August 31, 1955)

Nowhere does the court explain why the principle of the patent tying cases should be applied to ownership of land any more than to ownership of any other type of non-patented property. In *Standard Oil v. United States*, 337 U.S. 293, a Clayton Act case, this court drew a clear distinction as to the proof required to establish illegality of a tying contract under that Act and under the Sherman Act. The court said:

> "It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring. Yet the economic investigation which appellant would have us require is of the same broad scope as was adumbrated with reference to unreasonable restraints of trade in *Board of Trade v. United States*, 246 US 231, 62 L ed 683, 38 S Ct 242, Ann Cas 1918D 1207." (p. 312)

So here, to sustain the District Court would be to abolish all distinction between Section 3 of the Clayton Act and Section 1 of the Sherman Act, for obviously no tying arrangement could ever exist without ownership and hence "market control" by the appellants of "the particular property or product to which forced purchase of the second commodity is tied." The only question which would then be left in any tying case would be the substantiality of the commerce affected.

That patent tying cases, furthermore, are *sui generis*

is strongly intimated in the *Standard Oil* case and the *Times-Picayune* case. The court said in the former case that it could not dispose of it by citing the *International Salt* case, because no patent was involved and the requisite percentage of control of the market for the tying device was absent (p. 307), and in the latter case the court said:

> "Unlike other 'tying' cases where patents or copyrights supplied the requisite market control; any equivalent market 'dominance' in this case must rest on comparative marketing data." (p. 611)

The abuses which the rule of the patent tying cases and the Clayton Act sought to prevent have been repeatedly stated by the court in both patent infringement and antitrust cases. The effectiveness of the power of lawful monopoly conferred by the patent to expand into other fields so as to eliminate competition in the market for the tied article entirely has been demonstrated time and again before and since the passage of the Clayton Act. *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456. There is no decision and nothing in reason or experience which would support extension of the principle of the patent tying cases to the instant case.

The court's decision is also grounded on the statement in the *Standard Oil* case that in the *International Salt* case the availability of substitutes for the tying device was deemed irrelevant. On this point the District Court said:

> "* * * In *International Salt Co. v. U.S.*, supra, market dominance of defendant's particular salt

dispenser was held sufficient to sustain the first element of an unreasonable restraint *per se*, even though other dispensers were available in the market. *Standard Oil Co. of Calif., et al v. United States*, 337 U.S. 293 (1949) affirms such view of the *International Salt Co.* decision in the following language: 'It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.'" (June 23, 1956)

But in *International Salt* the existence of a patent monopoly made determination of the relevant market and proof of market dominance wholly unnecessary. In the *du Pont* case, however, where the question was whether monopoly existed, this court held that the relevant market was not the market for cellophane, but the market for all flexible packaging materials. The Government contended that in determining whether monopoly power exists over trade in a product, substitutes will not be considered other than those which are substantially fungible with the monopolized product and sell at substantially the same price. The court rejected this contention because it would lead to the absurd result that only physically identical products would be a part of the market.

The District Court also declined to give the decision in the *du Pont* case any weight, simply because it was grounded on Section 2 exclusively and because no tying arrangement was involved. In so ruling the court ignored the fact that in the *Times-Picayune* case this court

held that dominance in the advertising market must be decisive of the legality of the tying agreements in question under Section 1 of the Act. It did consider whether advertising media other than New Orleans daily newspapers could be deemed a part of the relevant market. While it held that the relevant market was limited to the advertising in the New Orleans daily newspapers, it did not reject consideration of substitutes as a matter of law, but held only that "the record contains no evidence which could circumscribe a broader or narrower 'market' defined by buyers' habits or mobility of demand" (p. 612 and note 31). In the *du Pont* case the court went through exactly the same process in circumscribing the relevant market in order to determine whether there had been a violation of Section 2. In so doing, it cites the *Times-Picayune* case with approval on this very point (p. 394). There is, therefore, no basis for making any distinction between the kind of market dominance necessary to support a finding of violation of Section 1 of the Sherman Act under the principles of the tying cases and the kind of market dominance required to support a finding of unlawful monopolization under Section 2, except the obvious distinction that the necessary market dominance in tying cases may be, and usually is, perfectly lawful in itself.

Finally, the full extent of the court's error is demonstrated by his comment that if appellants' position that the same kind of market dominance must be shown in tying cases as in unlawful monopolization cases is correct,

> "* * * there would never be any occasion for the doctrine of the tying cases because if you were con-

> sidering an established monopoly, you wouldn't have to be concerned about what the monopolist did with it. The monopoly in and of itself would be unlawful, and whether used for tying purposes or otherwise would be of no concern."

This view flouts the rule of the tying cases entirely. As was said in the *Times-Picayune* case:

> "* * * And because for even a *lawful* monopolist it is 'unreasonable, per se, to foreclose competitors from any substantial market,' a tying arrangement is banned by Section 1 of the Sherman Act when *both* conditions are met." (p. 609)

And again

> "* * * the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." (p. 611)

It is not the enjoyment of a dominant position which the law condemns under Section 1, but, contrary to the District Court's opinion, in the tying cases the chief concern of the courts is what the monopolist does with his power over one thing by way of imposing a restraint of trade in another.

It is submitted that the decision of the District Court fails to recognize that tying agreements in connection with the sale or lease of lands or standing timber or other natural resources may not, any more than any other tying agreements which are not within the prohibition of the Clayton Act, be presumed to result in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act without proof of their actual or intended effects, merely because they stem from the ownership of land and affect a not in-

substantial amount of commerce, and that the question of the reasonableness of the restraint in all such cases must depend upon a further showing that a defendant has such a dominating position in the relevant market for the particular type of land or other natural resources that any such use of his ownership rights will necessarily represent the wielding of monopolistic leverage to restrain commerce in the tied product. The decision would invalidate without proof of actual or potential harmful effects a practice followed by the Northern Pacific and many other railroads—and uniformly sustained by the courts—over a long period of years. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

M. L. Countryman, Jr.
176 East 5th Street
St. Paul 1, Minnesota

Dean H. Eastman
Roscoe Krier
Harold G. Boggs
909 Smith Tower
Seattle 4, Washington
Counsel for Defendants-Appellants

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,
v.
NORTHERN PACIFIC RAILWAY COMPANY and NORTHWESTERN IMPROVEMENT COMPANY, *Defendants*.
No. 2277

DECISION

By this action the government seeks to have certain contractual provisions contained in deeds and leases granted by defendants held illegal as contravening Section 1 of the Sherman Antitrust Act, 26 Stat. 209[1]. The action is authorized by Section 4 of the Act. Injunctive relief is sought to prevent enforcement of the contract provisions which defendants designate as "preferential routing agreements" and government counsel refer to as "traffic clauses." The terms of the clauses being the same under either designation, for brevity and convenience the latter term will be used herein.

The complaint was filed May 26, 1949. Since then, by answer, interrogatories, depositions and stipulation, many facts have been agreed to. The government moves for summary judgment under Rule 56(a)(c) on the undisputed facts. Discretion is not involved in considering the facts and the motion can only be granted to such extent as the law may warrant on facts shown in the record beyond genuine issue.

[1]"Every contract. . . . in restraint of trade or commerce among the several States. . . . is hereby declared to be illegal. . . ."

The material facts thus shown are: Defendant Northern Pacific Railway Company, a Wisconsin corporation (the NP herein), is the successor to a land grant railroad which in 1864 was chartered by Act of Congress for the purpose of constructing a railroad from Lake Superior to Puget Sound[2]. The NP is primarly engaged as a common carrier in the business of transporting passengers and freight in interstate commerce. Defendant Northwestern Improvement Company, a Delaware corporation (the Land Company herein) and wholly owned subsidiary of the NP conducts the business of selling, leasing and managing NP lands.

By congressional land grants the NP acquired slightly less than 39,500,000 acres of public land located, except for about 100,000 acres, in the area of the states in which the NP railway lines are now located, i.e., Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon.

Prior to the commencement of this action much of the granted land had been sold. Defendants now own approximately 2,700,000 acres of land exclusive of land for right-of-way, etc. classified by the Interstate Commerce Commission as for "transportation purposes." Some of the presently owned land was not acquired under the grants of public land. Approximately 21,000,000 acres of land were sold without reservation of any kind. Of the acreage sold with mineral reservations, 6,500,000 acres remain subject to such reservation.

The lands now owned by the defendants, as well as

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[2] For the summary of the history of the NP land grants see *United States v. Northern Pacific Railway Co., et al.* 256 U.S. 51 and *United States v. Northern Pacific Railway Co., et al.* 311 U.S. 317.

lands which they formerly owned and sold, are of many types. Some contain timber, iron ore, coal, oil and other natural resources. Some of the lands have been used for grazing and agriculture, while still others have been devoted to industrial developments of various kinds.

Traffic clauses in a variety of forms have been included in some of defendants' deeds and in almost all of the leases of lands in each of the categories referred to. The minimal obligation of all of the clauses in question requires the grantee or lessee to route via NP railway shipments of commodities produced by or on the land sold or leased, provided neither a lower rate nor better service be available from a competing line. Typical examples of defendants' traffic clauses are given below[3].

[3] A grazing lease: "All shipments of livestock, wool, mutton or beef made by or for the lessee, destined for points on the line of the Northern Pacific Railway, or its connections, shall be shipped over the Northern Pacific Railway, whenever its freight rates do not exceed the rates over other lines."

A lease of coal lands: "The lessee covenants that all coal removed from the premises as well as from adjacent lands now or hereafter controlled by it, as far as such coal is destined for rail shipment, and all incoming freight destined for use in the field of which the premises are a part, shall be shipped over the Northern Pacific Railway, provided its rates and service shall equal those of any competing line."

A timber contract or a contract for the sale of timberlands: "The purchaser agrees, as one of the material considerations of this contract, that rates being equal, he will ship via the Northern Pacific Railway all logs, poles, lumber and other products manufactured from the timber cut under this contract, or an equivalent quantity of lumber and other products manufactured from timber cut from lands not covered by this contract. Such shipments shall be made from time to time in the ordinary course of business as the timber is manufactured. Where the point of destination of the manufactured product is not on the line of the Northern Pacific Railway, such shipments shall be routed to favor said railway with the longest haul, if the expense to the purchaser is not increased over the cost of shipment over another rail line. The purchaser shall make monthly reports to the Railway Company of shipments under this provision and shall permit the Railway Company to examine his records at any convenient time or place for the purpose of verifying such reports."

The government contends that under the stated facts, shown in the record without genuine dispute, the traffic clauses provide for restraints of trade which are unreasonable per se and therefore violative of Section 1 of the Sherman Act under principles announced in the "tying" cases[1]. The essence of the contention is that defendants' dominance of NP land as a tying commodity or device has been used to foreclose or restrict competition in the tied commodity, transportation service to and from the land, the commerce in which is not "inconsequential or insubstantial" in amount.

Defendants contend that the rules of the tying cases are inapplicable to the facts of the instant case; that if so, neither the necessary dominance over the market in the tying commodity nor the required substantial volume of commerce in the tied commodity appears on the present record; and that defendants are entitled to present proof in support of their affirmative defenses alleging that in practice and effect the restraint of the traffic clauses is reasonable and beneficial.

Most, if not all, of the decisions of the United States

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[1] *Motion Picture Patents Co. v. Universal Film Mfg. Co., et al.* 243 U.S. 502 (1917); *McBoyle v. United States*, 283 U.S. 27 (1931); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1937); *Interstate Circuit Inc. et al v. United States*, 306 U.S. 208 (1939); *Ethyl Gasoline Corp. et al v. United States*, 309 U.S. 436 (1940); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1941); *B. B. Chemical Co. v. Ellis, et al.* 314 U.S. 495 (1942); *United States v. Masonite Corp., et al.* 316 U.S. 265 (1942); *Mercoid Corp. v. Mid-Continent Investment Co., et al.* 320 U.S. 661 (1944); *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944); *Hartford Empire Co. v. United States*, 323 U.S. 386 (1945); *Associated Press et al v. United States*, 326 U.S. 1 (1945); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. Griffith et al.* 334 U.S. 100 (1948); *United States v. Paramount Pictures, Inc. et al.* 334 U.S. 131 (1948); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

Supreme Court in tying cases based on either Sherman Act or Clayton Act or both, are listed in footnote 4.

Not any one of the cited cases is closely apposite in facts to the present case; but the facts of this case bring it squarely within a formula derived from all of the cited cases: When (1) a seller or lessor, enjoying market control of a particular commodity, in contracts for the sale or lease of such commodity, requires buyer or lessee to purchase a distinctly different and separate commodity, and (2) the amount of interstate commerce in the tied commodity is not insignificant or insubstantial, the tying arrangement is illegal *per se* under Section 1 of the Sherman Act.

The rationale of the tying doctrine is briefly stated in the latest of the decisions, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953):

> "Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet '[t]ying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949). By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince freely choosing

buyers to select it over others, anyway. Thus '[i]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one.' Id., at 306. Conversely, the effect on competing sellers attempting to rival the 'tied' product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

"For that reason, tying agreements fare harshly under the laws forbidding restraints of trade. . . ." (p. 605-606)[5]

The Supreme Court sustained summary judgments finding tying arrangements violations *per se* of the Sherman Act in *Associated Press et al v. United States*, 326 U.S. (1945) and in *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947). Application of tying principles is not limited to cases involving monopolies granted by patent and copyright. *United States v. Griffith et al*, 334 U.S. 100 (1948); *Times-Picayune v. U.S.*, supra. Specific intent to restrain trade or build monopoly is not necessary for a finding of antitrust law violation and "it is unreasonable *per se* to foreclose

[5] Existence of the necessary tying elements was not found in the *Times-Picayune* case. If in that case defendant newspaper publisher had required by contract provision the purchasers of advertising space to subscribe to defendant's papers, prices and service being equal to that of competing papers, with substantiality satisfied, the illegality *per se* of the requirement could hardly be doubted. The postulated situation is more analogous to the present case than the facts found in *Times-Picayune*.

competitors from any substantial market." *U.S. v. Griffith*, supra; *International Salt Co., Inc. v. U.S.*, supra.

The traffic clauses in question prohibit grantees and lessees of NP lands from a free choice in the selection of transportation routing in the shipment of commodities to and from the lands sold or leased. Admittedly, a large, if not major, portion of such shipments are in interstate commerce. Obviously, the traffic clauses provide at least a nominal "restraint of trade or commerce among the several states." While the Sherman Act provides that "every" contract in such restraint is illegal, ever since *Standard Oil v. United States*, 221 U.S. 1 (1911), only unreasonable restraints are held condemned by the Act. Unreasonable restraints are those which tend to create monopoly by restricting consumers or purchasers from enjoyment of the advantages of free competition. *Standard Oil v. U.S.* supra; *U.S. v. American Tobacco Co.*, 221 U.S. 106 (1911). Among the restraints held to be unreasonable *per se* are those effecting price fixing, boycott and a tying arrangement involving the two elements previously stated.

Defendants argue that the first tying element, i.e., market domination over the tying product, is not established because the record does not show the proportion of N.P. lands of various types to the total of the lands of the same types sold and leased in the area of defendants' operations. This contention ignores the plain language of the cited decisions, providing that market dominance of "the tying commodity" is required. The tying commodity need only be the particular property

or product to which forced purchase of the second commodity is tied; certainly it does not necessarily include all of the similar and competing commodities which may be in the market. Restraints of trade to be illegal under Section 1 of the Sherman Act must necessarily *tend* to monopoly but need not fully or substantially achieve it. In *International Salt Co. v. U.S.*, supra, market dominance of defendant's particular salt dispenser was held sufficient to sustain the first element of an unreasonable restraint *per se*, even though other dispensers were available in the market. *Standard Oil Co. of Calif., et al v. United States*, 337 U.S. 293 (1949) affirms such view of the *International Salt Co.* decision in the following language: "It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition." Defendants urge that *U.S. v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, decided after argument of the present case, holds in effect that the market dominance required as the first element of an illegal tying device is synonymous with the monopoly that is a requisite for violation of paragraph 2 of the Sherman Act. *DuPont*, grounded solely on paragraph 2, was not concerned with a tying arrangement and neither the tying principles nor the decisions in which they have been developed are discussed in the opinion. As the majority opinion indicates and the concurring opinion states: "Sections 1 and 2 of course implicate different considerations." Nothing in the reasoning or language of the Supreme

Court decisions requires adoption of defendants' view of the market involved in the first element of the tying formula.

The tying commodity in the present case is the land presently or formerly owned by NP. Unrestricted fee simple title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land.

Existence of the second of the tying elements is dependent on the amount of commerce in the tied commodity with, at most, only remote regard to the total amount of commerce in commodities of a like or similar kind in the same market area. The record amply shows that actual or potential commerce in transportation of commodities from the properties subject to the traffic clauses is very substantial, however that commerce may compare with the whole volume of commodity transportation in the area served by NP[6]. The ad-

[6]By their Responses to Plaintiff's Request for Admissions under Rule 36, filed January 14, 1952, defendants admitted the existence of the following leases containing traffic clauses, all valid and subsisting as of 1949, the year in which suit was commenced:

(1) At least 1,000 leases involving more than 1,000,000 acres of grazing lands. (See Response to Request IV)

(2) At least 16 leases of iron ore land, covering 5,261 acres. (See Response to Request VII)

(3) At least 2 leases of coal lands. (See Response to Request VI)

(4) At least 19 oil and gas permits or leases, covering 135,000 acres of land. (See Response to Request V)

In addition, defendants admit the existence of the following contracts for the sale of timber or timberland subject to traffic clauses:

(1) Out of 75 contracts for the sale of timberland, involving over 2,000,000 acres of land and over 21,000,000,000 board feet of timber,

mitted amount of commerce in transportation restrained by the traffic clauses in each of the categories in question is not inconsequential or insubstantial.

The stipulation of the parties filed May 16, 1950 shows that of the approximate 8,000 industrial leases (including grain elevator and grain warehouse leases), with minor exceptions, all grant a use of right-of-way lands. Such lands are an integral part of the property devoted to railway operations and are directly related to transportation, the asserted tied commodity. Whether under such circumstances the industrial leases involve distinct and separate tied and tying commodities, as held required and found lacking in *Times-Picayune v. U.S.*, supra[7], presents at least a question of fact which precludes summary judgment and will require trial as to all issues pertaining to the industrial leases.

On the established facts all of the traffic clauses in question, excepting those in the industrial (including grain elevator and grain warehouse) leases, are shown to be violative of Section 1 of the Sherman Act under the principles enunciated in the tying cases. Findings and decree to such effect will be settled at a hearing for

[7] "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. . . ." *Times-Picayune v. U.S.*, supra.

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at least 42 of such contracts were subject to traffic clauses. (See Response to Request I and Exhibit A)

(2) Out of 210 timber contracts, involving more than 390,000 acres of land and more than 6,000,000,000 board feet of timber, at least 157 of such contracts included traffic clauses. (See Response to Request II and Exhibit B)

the purpose which may be noted at the convenience of counsel.

Dated this 23rd day of June, 1956.

GEO. H. BOLDT
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, vs. NORTHERN PACIFIC RAILWAY COMPANY and NORTHWESTERN IMPROVEMENT COMPANY, *Defendants*.	}	No. 2277

TRANSCRIPT OF COURT'S ORAL DECISION denying motion for reconsideration held in the above-entitled and numbered cause in the above-entitled court before the Honorable GEORGE H. BOLDT, United States District Judge, on Friday, August 31, 1956, at Seattle, Washington.

APPEARANCES

On behalf of the Plaintiff:

Miss Margaret Brass,
Attorney at Law,
Department of Justice,
Washington, D.C.

On behalf of the Defendants:

Mr. Dean H. Eastman,
and
Mr. Harold G. Boggs,
Attorneys at Law,
909 Smith Tower Bldg.,
Seattle, Washington.

Mr. M. B. Countryman, Jr.,
General Counsel for Northern Pacific Railroad,
St. Paul, Minnesota.

THE COURT: Mr. Boggs, I have been listening very attentively, first, to be certain that I understand your proposition, and, secondly, to be certain that your proposition was fully and thoroughly considered before I made this decision, and I am going to answer both in the affirmative.

I think I do understand your proposition and I gave it full thought, much mental or figurative sweat, if not tears, in arriving at my conclusions about it. I am going to deprive myself of the pleasure of having Miss Brass address me on this because I am so thoroughly satisfied that your contentions were thoroughly and fairly and fully considered, as far as my humble talents would permit of it, before I entered into this decision.

Now, I might say that this problem, as most that are presented to me, is not entirely free from doubt, not nearly so as a once written decision sometimes indicates. What we write for posterity sometimes is a little more emphatic than we might genuinely feel.

However, in this instance I have little doubt about it. Where you people differ in your view and Miss Brass's view, in my opinion is at the point of departure. It seems so to me.

If you are right in your view that in a case grounded on Paragraph 1 of the Sherman Act, monoply must be shown and that the term "dominance" and "market" are interchangeable, then my opinion is probably wrong. However, I should point out that if that be true, there would never be any occasion for the doctrine of the tying cases because if you were considering an established monoply, you wouldn't have to be con-

cerned about what the monopolist did with it. The monopoly in and of itself would be unlawful, and whether used for tying purposes or otherwise would be of no concern.

MR. BOGGS: That contention is answered right in the Dupont case itself.

THE COURT: Well, let me point out wherein I think the Dupont case does not have the teaching for our case that you suggest.

In the first place, the Dupont case was grounded on Section 2 exclusively and has no necessary relationship to Section 1 at all.

Secondly, it was not contended or asserted in that case that there was any tying arrangement, and neither the tying cases nor tying principles are cited or even discussed in that opinion.

Thirdly, the majority opinion itself and Justice Frankfurter's opinion both allude to the fact that very different considerations are involved when you are dealing with Paragraph 1 rather than Paragraph 2 of the Sherman Act.

Justice Frankfurter says Sections 1 and 2, of course, implicate different considerations, and in the majority opinion, at the very beginning of it in stating the proposition for consideration, they say, "Market limitation is necessary under Dupont's theory to determine whether an alleged monopoly violates Section 2. The ultimate consideration in such a determination is whether the defendant controlled the price and competition in the market for such trade or business as they are charged with monopolizing."

Now, the plain language of the Sherman Act, granting that it hasn't been seen to be so plain until recent times, makes a restraint of trade under Paragraph 1, illegal. It doesn't say anything about monoply.

Now, it has been construed, and I think rightly so, to mean that the restraint must tend towards monoply; but the Supreme Court has not in any case said that monoply is a requisite under Paragraph 1.

Now, the paragraph that deals with monoply, as such, is Paragraph 2 of the Act.

Your suggestion that the two are interchangeable, I cannot go along with. I cannot agree to that. It may be that you are right and I am wrong. I don't think so, but the Supreme Court may hold otherwise.

Now, in the cases, at least until later times, there has been a regrettable confusion of terms, confusion of the two sections. Often they are referred to loosely in such a manner that it takes a very, very careful reading to comprehend which section is involved.

For example, in Times-Picayune, looking back over that opinion, after all the thought and effort I have given to it, I can see both sections involved, both 1 and 2. They found against Section 2 because there was no monoply for the reasons they outlined. They found against Section 1 because the tied commodity was not a separate and distinct commodity and they said so, although it is not spelled out quite as directly or briefly and precisely as I have tried to do in my opinion.

Now, in my judgment that is what is involved in Times-Picayune. That is what I meant by the footnote

in my written decision. I was a little hesitant about putting that footnote in because there are other considerations that might perhaps enter into it. However, I finally put it in simply to illustrate a very narrow facet of the matter, and I am afraid that I haven't done it very well from the fact that you misinterpreted the purpose of it. It still is a footnote, and rarely do footnotes become very authoritative, so I am leaving it in.

Now, the Dupont case, in my judgment, has no bearing on our case at all.

Times-Picayune does insofar as it treats Section 1 and as I tried to point out in my opinion, rather briefly it is true, but that is no fault in opinions if they are clear, that the gravamen of the decision found that the second alleged tying product was not a separate and distinct commodity, and, accordingly, the tying principles were not applicable. At least that is the way I construe it.

I will agree that many times opinions take a great deal of reading and re-reading, and, unfortunately, at times language is used that is not easy to apply to other cases.

In any event, I am afraid you cannot persuade me that your view is correct and the one expressed in the opinion is wrong, and I think I will have to deny the motion for reconsideration.

Do you feel I have given you a fair opportunity to present your argument?

MR. BOGGS: I wouldn't mind, however, making a comment or two on some of your Honor's remarks.

First, that if there is monoply, that ends it in all cases. There may be legal monoplies and that is recognized in the Dupont case. It says, "Two questions raised at the record and decided by the Court below, the Court found that even if Dupont did possess monoply power over sales of cellophane, it was not subject to the Sherman Act of prosecution because, 1, the acquisition of that power was protected by patents; 2, that power was acquired solely through Dupont's expertness."

Now, you recall in the Aluminum case, Judge Learned Hand said that monoply may be thrust upon you and that it was not the purpose of the anti-trust laws to discourage what in the end is the aim of everyone who competes is to get the mostest.

THE COURT: I have that in mind.

MR. BOGGS: So that I can't agree that it would not be possible to have a violation under Section 1 merely because you happen to have what the Court might call a monoply. It might be a perfectly legal monoply.

Now, the second comment I wish to make is that I find it difficult to understand, I am not trading on words, we are talking about monoply, dominance, no matter how you may describe it, but in both cases the Court—that is, I am speaking now of the Times-Picayune case treating as tying contract and granting that there was this other ground, and also the Section 2 ground that it was talking about Section 1, that in determining whether there was this power, this power which was a necessity in the process of determining the legality or illegality, they used exactly the same process, determining relevant market and your place in it.

Now, those are the two comments I have on your reasoning.

THE COURT: I cannot agree that the market dominance of a particular tying produce required under the tying doctrine, and monoply of the market as required for violation of Section 2 of the Sherman Act, are one and the same thing.

They have comparable elements that are to be considered, but I think you could have market dominance of a particular product and only a very small share of the whole market in that type of product.

MR. BOGGS: That might be true.

THE COURT: If you use market dominance over that particular product to force purchase of other tied products and there is a substantial volume of such restraint of trade, it is taboo.

MR. BOGGS: I would like to ask one more question which I would like to get clear also. When you say you are dominant in that product, in the arriving at that dominance, don't you think that you have to consider the relationship of that product with other competing products?

THE COURT: In some cases you would, in others you wouldn't. If the facts show that you have absolute fee simple title over vast quantities of land, that shows the dominance right there. There isn't any further need be shown because you had absolute market control even more unlimited in some respects than the patent holder.

MR. BOGGS: I just wanted to understand you.

THE COURT: We see, I think, each other's point of

view. Unfortunately, we don't agree, and it may well be that you will turn out to be right and I am wrong. However, it certainly illustrates to my mind the wisdom of presenting all these basic issues clearly on motion for summary judgment without taking many long weeks and a vast amount of testimony when we can't agree as to what the criteria are on which we are to determine the case.

MR. BOGGS: I want to thank you, your Honor.

THE COURT: You may enter a minute order denying the motion for reconsideration.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, vs. NORTHERN PACIFIC RAILWAY COMPANY and NORTHWESTERN IMPROVEMENT COMPANY, *Defendants*.	CIVIL No. 2277

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Description of Defendants

1. Defendant Northern Pacific Railway Company (Northern Pacific) is a Wisconsin corporation. It was formed in 1870 under the name of Superior and St. Croix Railroad Company. Northern Pacific is the successor to the Northern Pacific Railroad Company, which was chartered by a special act of Congress on July 2, 1864. In 1896 Northern Pacific acquired the properties of the Northern Pacific Railroad Company. Since that time Northern Pacific has engaged as a common carrier in the business of transporting passengers and freight in interstate commerce. It is found and transacts business in this District. (Complaint, Par. 7; Par. 2; Answer, Par. 3, 1).

2. Defendant Northwestern Improvement Company (Northwestern) is a Delaware corporation and a wholly-owned subsidiary of Northern Pacific. In 1942 it became the successor in interest to a wholly-owned subsidiary of Northern Pacific, which was incorporated in New Jersey in 1897, under the name of Northwestern Improvement Company. Defendant Northwestern sells,

leases and manages certain lands acquired from Northern Pacific. It is found and transacts business in this District. (Complaint, Par. 8; Par. 2; Answer, Par. 3. 1).

II. Nature of Interstate Trade and Commerce Involved

3. The Northern Pacific Railroad Company, the predecessor of Northern Pacific (hereinafter referred to as the Railroad Company), was a land grant railroad, which was chartered by Congress in 1864 to construct a railroad from Lake Superior to Puget Sound with a branch by way of the Columbia River to Portland, Oregon. In aid of this construction, a land grant was made to the Railroad Company by the Act of Congress of July 2, 1864. This grant consisted of every alternate section of public land, not mineral, in the amount of twenty sections per mile through territories and ten sections per mile through states on each side of the railroad line to be erected between Lake Superior and Puget Sound. The Railroad Company was privileged to select in lieu of the granted lands which should be found to have been previously granted, sold or occupied, alternate odd-numbered sections located not more than ten miles beyond the limits of the original grant. In lieu of mineral lands, the Railroad Company was privileged to select land suitable for agricultural purposes, provided land so selected was located within fifty miles of the railroad line. (Complaint, Par. 9; Answer, Par. 4).

4. By an Act of Congress of May 31, 1870 the Railroad Company was authorized to construct the main

line by way of the Columbia River to Puget Sound, and a branch across the Cascade Mountains to Puget Sound. By the Act of Congress of May 31, 1870, Congress made an additional grant of land to the Railroad Company in connection with the construction of the line between Portland, Oregon, and Puget Sound. This grant was made upon the same terms as the original grant made in 1864. The Acts of 1864 and 1870 also granted the Railroad Company a right-of-way over public lands of two hundred feet in width on each side of the definite location of the railroad line. (Complaint, Par. 10; Answer, Par. 4).

5. The Railroad Company completed its line between Lake Superior and Puget Sound in August 1883. Northern Pacific now operates and controls a total of 6,888.6 miles of railroad within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon. The lines of Northern Pacific are substantially paralleled by the later constructed lines of the Great Northern Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. (Complaint, Par. 11; Answer, Par. 5).

6. Under the land grants made by Congress Northern Pacific received 39,494,391 acres of land, of which all but approximately 100,000 acres was located in the states in which its lines now operate. (Complaint, Par. 12; Answer, Par. 6).

7. Prior to the commencement of this action, much of the granted land had been sold. Defendants now own approximately 2,700,000 acres of land exclusive of land for right-of-way purposes. This acreage includes,

in addition to land acquired by the Acts of 1864 and 1870, some land acquired by purchase and under other land grant Acts. Approximately 21,000,000 acres of land have been sold by the defendants without reservation of any kind. Of the acreage sold with mineral reservations, over 6,500,000 acres remain subject to such reservation. (Complaint, Par. 12; Answer, Par. 6).

8. The lands now owned by the defendants as well as lands formerly owned and sold by them are of different types. Some contain timber, iron ore, coal, oil and gas or other natural resources. Some of the lands have been used for grazing and agriculture, while others have been used for the location of industrial sites of various kinds. (Complaint, Par. 12; Answer, Par. 6).

9. Defendants are and have been engaged in the sale of land and of standing timber and in the leasing of land with rights to remove timber, oil, gas, metals, clay, coal and other natural resources. Defendants are and have been engaged in the leasing of land for grazing purposes pending the sale thereof and for industrial sites. Many of these grazing lands have been under lease for many years. (Complaint, Par. 12; Answer, Par. 6).

10. Defendants customarily include in their lease agreements provisions which require the lessee to make shipments over the lines of Northern Pacific, when reached via its lines and when service and rates are equal. These provisions, commonly known as traffic clauses or preferential routing agreements, have been included in almost all of the leases of land and in some of defendants' deeds of land and contracts relating to the sale of land and of timber. The minimal obligation

of all of these traffic clauses requires the grantee or lessee to route over the lines of Northern Pacific shipments of commodities produced by or on the land sold or leased, provided that neither a lower rate nor better service be available from a competing line. A large portion of the shipments of products affected by the traffic clauses has been and is shipped in interstate commerce. (Complaint, Par. 13; Answer, Second Defense; Response and Supplemental Response to Request for Admissions; Stipulation re Sources of Fact Information and Related Matters, Par. 7).

11. Many commodities produced on or derived from, or distributed through the use of, lands now or formerly owned by defendants, and many products manufactured from such commodities are sold and shipped in interstate commerce. These commodities include, but are not limited to, timber, lumber, millwork, plywood, pulp wood, paper, coal, oil, gas, metals, minerals, animals and animal products. A variety of manufactured products, machinery, foodstuffs, mining and lumbering equipment and supplies, is shipped in interstate commerce from other states to states in which lands owned and formerly owned by defendants are located. (Complaint, Par. 14; Answer, Par. 8).

12. The defendant Northern Pacific is engaged in the business of transporting commodities and products in interstate commerce, including many of the commodities produced or derived from or distributed through the use of lands now or formerly owned by defendants, and many products manufactured from such commodities. Means of transportation other than the lines of defendant Northern Pacific are available for

the transportation of a substantial part of said commodities and products during all or a part of their interstate shipment, including the railroad lines of the Great Northern Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, numerous motor freight lines, and steamship lines. (Complaint, Par. 15; Answer, Par. 9).

III. Use of Various Types of Traffic Clauses or Preferential Routing Agreements

A. Traffic Clauses Contained in Grazing Leases

13. Defendants' grazing leases contain a traffic clause providing in substance that the lessee shall ship over the lines of Northern Pacific all shipments of livestock, wool, mutton or beef made by or for the lessee, destined for points on the lines of Northern Pacific or its connections, whenever its freight rates do not exceed the rates of other lines. (Answer, page 8).

14. In 1949 there were over 1,000 grazing leases containing such a traffic clause in effect, covering more than 1,000,000 acres of land. (Request for Admission IV; Response to Request for Admission IV).

B. Traffic Clauses Contained in Oil and Gas Leases

15. Defendants' usual form of oil and gas lease contains a traffic clause providing in substance that the lessee shall ship over such railroad line as Northern Pacific may designate all products obtained from the leased premises, as well as from adjacent lands then or thereafter controlled by the lessee, or manufactures from said products insofar as such products or manufactures are destined for rail shipment, as well as all

incoming freight destined for use in the general territory of which the leased premises are a part, provided that the rates and service of the designated line shall equal those of any competing line. (Answer, page 8).

16. Defendants' usual form of oil and gas lease also provides that all oil controlled by the lessee produced from the leased premises and from other lands in the oil field of which the leased premises are a part, shall be delivered to a pipeline reaching the rails of Northern Pacific where such a pipeline is available and a price can be obtained for oil so delivered which is at least equal to the price then obtainable for oil produced on the leased premises and delivered to any other pipeline. (Answer, page 8).

17. Defendants' usual form of oil and gas lease also provides that should the lessee decide to construct or cause others to construct a refinery to refine the oil from the field of which the leased premises are a part, the refinery shall be located at some point on Northern Pacific's lines, provided such construction is as economical and feasible as construction on the lines of any other railroad company, and all of the products of the refinery shall be shipped over the lines of Northern Pacific and its connections provided rates and service shall equal those of any competing line, and the lessor shall have the preference right to purchase at market price all fuel oil offered for sale. (Answer, page 8).

18. Defendants have granted 50 oil and gas leases which contained one or more of the above described traffic clauses. In 1949 there were at least 19 oil and gas leases containing traffic clauses in effect, covering 135,-

000 acres of land. (Request for Admission V; Response to Request for Admission V).

C. Traffic Clauses Contained in Leases of Coal Lands

19. Defendants' leases of coal lands generally contain a traffic clause providing that the lessee shall ship over Northern Pacific lines all coal removed from the leased premises, as well as from adjacent lands then or thereafter controlled by the lessee, insofar as such coal is destined for rail shipment, and all incoming freight destined for use in the field of which the leased premises are a part, provided Northern Pacific's rates and service equal those of any competing line. (Answer, page 9).

20. A traffic clause has been contained in 111 of defendants' leases of coal lands. At least 12 coal leases containing a traffic clause were in effect in 1949. (Request for Admission VI and Appendix VI; Response to Request for Admission VI; Supplemental Response to Request for Admission VI).

D. Traffic Clauses Contained in Leases of Land for the Removal of Iron Ore

21. Defendants' leases of land for the removal of iron ore generally contain a traffic clause providing in substance that the lessee, his successors and assigns shall ship over such line as Northern Pacific may designate all iron ore mined and shipped from the leased premises, as well as all treated products and concentrates mined from the leased premises, provided that rates, service and facilities equal those of any competing line. (Answer, page 9).

22. Defendants have granted 30 iron ore leases containing traffic clauses covering substantially 6,461 acres of land. In 1949 there were at least 16 leases of iron ore land containing such traffic clauses in effect, covering 5,261 acres of land. (Request for Admission VII; Response to Request for Admission VII).

E. Traffic Clauses Contained in Mineral Land Leases

23. Defendants' leases of mineral land for removal of minerals other than coal or petroleum contain a traffic clause which in substance requires the lessees to ship the particular mineral involved over the lines of Northern Pacific if rates, and in some instances service or facilities of Northern Pacific are equal to those of other lines. Some of the mineral land traffic clauses require the lessee to ship over Northern Pacific's lines products manufactured from the mineral removed from the land or minerals removed from adjacent lands then or thereafter controlled by the lessee. A number of the mineral land leases provide that the traffic clause shall be binding upon the lessee's successors and assigns. (Request for Admission III; Response to Request for Admission III; Supplemental Response to Request for Admission III, Exhibit C, and Appendix, pp. 37-43).

24. Defendants have granted 63 leases of mineral land containing traffic clauses, covering 42,466 acres of land. In 1949 there were at least 17 mineral land leases containing traffic clauses in effect, covering 6,810 acres of land. (Request for Admission III; Supplemental Response to Request for Admission III and Exhibit C).

F. Traffic Clauses Contained in Deeds and Contracts Relating to the Sale of Timberland

25. Defendants' contracts relating to sales of timberlands have contained a traffic clause requiring in substance that, rates being equal, the grantees and in some instances successors and assigns shall ship over the lines of Northern Pacific all logs, poles, lumber and other products manufactured from timber cut from the lands, and in some instances from other lands in the vicinity which the purchaser at any time may control, or an equivalent quantity of lumber and other products manufactured from timber cut from lands not covered by the sale. Where the point of destination of the manufactured product is not on Northern Pacific lines, the purchaser is required to route shipments so as to give Northern Pacific the longest haul if the expense to the purchaser is not increased over the cost of shipment over another rail line. In some instances, the purchaser has been required to offer to sell the logs and poles produced from the sold lands to such companies as will agree to ship via Northern Pacific if rates are equal. (Request for Admission I; Response to Request for Admission I and Exhibit A; Supplemental Response to Request for Admission I and Appendix pp. 1-36; Answer, page 10)

26. Defendants' sales of timberland generally have been conditioned upon a provision that the purchaser shall make monthly reports to Northern Pacific of shipments under the traffic clause provision and shall permit Northern Pacific to examine its records for the purpose of verifying the reports. (Request for Admission I; Re-

sponse to Request for Admission I; Supplemental Response to Request for Admission I; Answer, page 10).

27. Out of 75 of defendants' contracts for the sale of timberland involving approximately 2,144,177 acres containing approximately 21,554,766,000 board feet of timber, at least 73 contracts covering 2,144,137 acres and containing 21,553,762,000 board feet of timber were subject to traffic clauses. (Request for Admission I; Response to Request for Admission I and Exhibit A; Supplemental Response to Request for Admission I and Appendix, pp. 1-36).

G. Traffic Clauses Contained in Timber Sale Contracts

28. Defendants' timber sale contracts generally contain a traffic clause providing in substance that, rates being equal, the purchaser, and in some instances successors and assigns, shall ship over Northern Pacific lines all logs, poles, lumber and other products manufactured from the timber cut under the contract, or an equivalent quantity of lumber and other products manufactured from timber cut from lands not covered by the contract. Where the point of destination of the manufactured product is not on Northern Pacific lines, the purchaser is required to route shipments so as to give Northern Pacific the longest haul if expense to the shipper is not increased above the cost of shipment over another rail line. (Answer, page 10; Request for Admission II; Supplemental Response to Request for Admission II).

29. Defendants' timber sale contracts generally contain a provision that the purchaser shall make monthly reports to Northern Pacific of shipments under the

traffic clause provision and shall permit Northern Pacific to examine its records for the purpose of verifying the reports. (Answer, page 10).

30. Out of 210 timber sale contracts involving 394,135 acres of land and more than 6,000,000,000 board feet of timber, at least 199 of such contracts included traffic clauses. In 1949 there were 31 timber sales contracts having traffic clauses in effect, covering 100,585 acres and 1,491,895,995 board feet of timber. (Request for Admission II; Response to Request for Admission II and Exhibit B; Supplemental Response to Request for Admission II and Appendix, pp. 1-36).

H. Traffic Clauses Contained in Industrial Leases Including Grain Elevator and Grain Warehouse Leases

31. Defendants at the time of suit had in effect 8,000 leases of sites used for various commercial and industrial purposes. All but about 400 of defendants' 8,000 industrial leases (other than grain elevator and grain warehouse leases) contain a traffic clause providing that rates being as favorable, the lessee shall do all transportation business over the lines of Northern Pacific. (Answer, page 12; Stipulation filed May 16, 1950 re leases entered into by Industrial Development Department of Northern Pacific).

32. Of defendants' 8,000 industrial leases, 939 are for grain elevator and grain warehouse purposes. All of such grain elevator and grain warehouse leases contain a clause providing in substance that Northern Pacific shall have the exclusive right to carry all grain to be transported from the grain elevator. (Answer, page 13;

Stipulation filed May 16, 1950 re leases entered into by Industrial Development Department of Northern Pacific).

33. Northern Pacific is a party to certain contracts with other railway companies which provide for joint operation of its lines of railway. There are 366 industrial leases in effect covering properties on the right-of-way for such lines of railway. Each of these industrial leases contains a traffic clause providing that, rates being as favorable, the lessee will do all transportation business over the lines of Northern Pacific. The lessees of these industrial sites affected by the joint operation agreements have been notified that the traffic clause is not effective against the joint operating railroad. (Stipulation filed May 16, 1950 re leases entered into by Industrial Development Department of Northern Pacific).

34. In July 1913 all industrial leases of Northern Pacific's right-of-way between South Tacoma and Vancouver, Washington were cancelled and revised leases not containing any traffic clauses were substituted. No traffic clause has been incorporated in such industrial lease since 1913. (Stipulation filed May 16, 1950 re leases entered into by Industrial Development Department of Northern Pacific).

35. At the request of certain lessees, no traffic clause was incorporated in 390 industrial leases in effect at the commencement of suit. (Stipulation filed May 16, 1950 re leases entered into by Industrial Development Department of Northern Pacific).

IV. Conclusory Findings

36. The actual and potential commerce involved in defendants' traffic clauses or preferential routing agreements is very substantial. The amount of commerce in transportation involved by each of the categories of traffic clauses is not inconsequential or insubstantial.

37. Defendants, as sellers and as lessors, by reason of title in fee simple, have dominance in the lands now owned by them and had dominance in the lands formerly owned at the time of sale of such lands.

38. Defendants have used their dominance in the lands sold and leased to require purchasers and lessees to purchase and use Northern Pacific's transportation service, under the conditions stated in finding 10.

39. The traffic clauses contained in defendants' leases and the traffic clauses employed in connection with the sales of timberland and timber prohibit lessees, grantees and purchasers of Northern Pacific lands and timber from exercising a free choice in the selection of transportation routing in the shipment of commodities to and from the leased and sold lands, and from the land on which the timber sold under the timber sale contracts is located, under the conditions stated in finding 10.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the defendants.

2. There is no genuine issue as to any material fact with respect to any of defendants' traffic clauses except those contained in defendants' leases of land for use as industrial sites or for grain elevator or grain warehouse purposes.

3. For many years the defendants have been parties to contracts, agreements, arrangements and understandings in unreasonable restraint of commerce in the transportation of commodities by rail, truck and steamship lines, all in violation of Section 1 of the Sherman Act.

4. The amount of interstate trade and commerce which is restrained by the illegal contracts to which defendants are parties is substantial.

5. The plaintiff is entitled to judgment as a matter of law with respect to all of defendants' contracts and leases other than industrial leases.

GEO. H. BOLDT
United States District Judge

Dated: August 31, 1956

Presented by:
MARGARET H. BRASS
Attorney, Department of Justice

Approved as to form:
HAROLD G. BOGGS
Of Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and NORTHWESTERN IMPROVEMENT COMPANY, *Defendants*.

CIVIL No. 2277

PARTIAL FINAL JUDGMENT

This matter having come on for a hearing before the Court upon a motion of the plaintiff for summary judgment, counsel for the parties having been heard, and the Court having determined, upon consideration of the pleadings, admissions and stipulations on file, that there is no genuine issue between the parties as to any material fact with respect to all of the claims involved in this action other than claims based upon defendants' industrial leases (including grain elevator and grain warehouse leases), and the Court having filed its opinion herein on June 23, 1956, granting the motion for summary judgment with respect to all claims other than claims based on defendants' industrial leases, and it appearing to the Court that there is no just reason for delay in entering a final judgment in accordance with that decision on all of the multiple claims upon which summary judgment has been granted;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction of the subject matter hereof and of the parties hereto.

2. The defendants Northern Pacific Railway Company (Northern Pacific) and Northwestern Improve-

ment Company (Northwestern) have entered into contracts in restraint of, and have used their ownership and control of land to restrain interstate trade and commerce in the transportation of products in violation of Section 1 of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Act, 15 U.S.C. §1.

3. Every condition, agreement or understanding contained in defendants' lease agreements (except industrial leases, grain elevator leases and grain warehouse leases) or in defendants' contracts for or relating to the sale of timberland or timber, that the lessee or purchaser shall ship products produced on the land, or on adjacent lands, or manufactured from products so produced, over the lines of defendant Northern Pacific or over the lines of a railroad to be designated by Northern Pacific or shall ship incoming freight over the lines of Northern Pacific, are hereby adjudged unlawful and declared null and void.

4. The defendants Northern Pacific and Northwestern, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with said defendants who receive actual notice of this Final Judgment by personal service or otherwise are hereby perpetually enjoined:

(a) From enforcing or attempting to enforce any condition, agreement or understanding adjudged unlawful in paragraph 3 hereof.

(b) From entering into any contract, agreement or lease (except industrial leases, including grain elevator and grain warehouse leases) containing provisions

which are identical with or similar to those adjudged unlawful in paragraph 3 hereof, or from fixing a price or rental for the sale or lease of land upon the condition, agreement or understanding, directly or indirectly, that the purchaser, assignee, vendee, lessee, or sublessee shall ship products on or from the land, or commodities manufactured from such products, over the lines of Northern Pacific or the lines of any other carrier, or shall ship incoming freight over the lines of Northern Pacific.

(c) From making or carrying out contracts, agreements or understandings having the purpose or effect of continuing, reviving or renewing any contract provision adjudged to be unlawful by paragraph 3 of this Final Judgment.

(d) From requiring any purchaser or lessee of land (except a lessee under an industrial lease, grain elevator lease or grain warehouse lease) or purchaser of timber to make reports of the amount or nature of shipments made by such purchaser or lessee over the lines of Northern Pacific or any other carrier, or to keep records of such shipments, or to permit defendants to have access to any records kept of such shipments.

5. Within 60 days after the entry of this Final Judgment, defendants shall, in writing, fairly advise each person with whom they, or either of them, have a contract containing any condition, agreement or understanding adjudged to be illegal in paragraph 3 hereof of the substantive terms of this Final Judgment. Defendants shall file with the Court proof of compliance with this paragraph.

6. The defendants shall use all reasonable efforts to ascertain the identity of all purchasers or sublessees from purchasers or lessees of Northern Pacific with whom defendants, or either of them, have or had a contract containing any condition, agreement or understanding adjudged illegal by paragraph 3 hereof, and within 120 days from the entry of this Final Judgment defendants shall serve written notice upon each of such purchasers or sublessees that the contracts are to that extent illegal, null, void and unenforceable. Defendants shall file with the Court proof of compliance with this paragraph.

7. For the purpose of securing compliance with this Final Judgment, and for no other purpose, any duly authorized representative or representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on notice reasonable as to time and subject matter made to the principal office of the Northern Pacific Railway Company and Northwestern Improvement Company, and subject to any legally recognized privilege, be permitted:

(a) Access during the office hours of said corporate defendants to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said corporate defendants relating to any matters contained in this Final Judgment;

(b) Subject to the reasonable convenience of said corporate defendants and without restraint or interference from defendants, to interview officers or employees

of said defendants, who may have counsel present, regarding such matters, provided, however, that no information obtained by the means provided in this Paragraph 7 shall be divulged by the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party, or as otherwise required by law.

8. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Let this partial final judgment be entered.

Done this 31st day of August, 1956.

GEO. H. BOLDT, *Judge*.

Presented by:

MARGARET H. BRASS
Attorney, Department of Justice

Approved as to form:

HAROLD G. BOGGS
Of Counsel for Defendants

APPENDIX B

Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C. 1), as amended:

"§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each

other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."